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No. _____

IN THE

Supreme Court Of The United States

October Term, 1984

MAGNOLIA BROKERAGE COMPANY, JERROLD DEAN THORNTON, LIGON SPECIALIZED HAULERS, INC., MAGNOLIA FREIGHT AGENCY, INC.,

Petitioners

v.

ANTHONY L. JACKSON, OLLIE JACKSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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April 15, 1985

40 pp

QUESTIONS PRESENTED

1. Whether in an appeal from a federal district court exercising diversity jurisdiction the rule of a state statute applicable to appeals from money judgments in civil cases, which requires a defendant who unsuccessfully appeals to pay a monetary penalty to the plaintiff, may be applied in place of and to the exclusion of the applicable Federal Rules of Appellate Procedure, specifically Rule 8 and Rule 38.

2. Whether a panel of a court of appeals is entitled to disregard a controlling decision of this Court simply because a local circuit rule provides that a panel may not overrule a precedent of the circuit.

The following question presented is not relied upon in this petition:

3. Whether Ala. Code § 12-22-72 (1975) contravenes the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

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Supreme Court Of The United States

October Term, 1984

MAGNOLIA BROKERAGE COMPANY, JERROLD DEAN THORNTON, LIGON SPECIALIZED HAULERS, INC., MAGNOLIA FREIGHT AGENCY, INC.,
Petitioners

v.

ANTHONY L. JACKSON, OLLIE JACKSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners Magnolia Brokerage Company, Jerrold Dean Thornton, Ligon Specialized Haulers, Inc., and Magnolia Freight Agency, Inc. respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on November 21, 1984.

OPINION BELOW

The original opinion of the Court of Appeals is reported at 742 F.2d 1305 (11th Cir. 1984). The order which is the subject of this petition, not yet reported, appears in the appendix hereto. The memorandum opinion rendered by the District

Court for the Northern District of Alabama, which is not reported, appears in the appendix hereto.

JURISDICTION

The order of the Court of Appeals was entered on November 21, 1984. A timely petition for rehearing and suggestion of en banc consideration was denied on January 18, 1985, and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. *Ala. Code* § 12-22-72 (1975):

> § 12-22-72 *Affirmation of stayed judgment — Generally.*
>
> When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 percent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs by the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court. (Code 1852, §§ 3032, 3033; Code 1867, §§ 3500, 3501; Code 1876, §§ 3941, 3942; Code 1886, §§ 3661, 3662; Code 1896, § 478; Code 1907, § 2893; Code 1923, § 6153; Code 1940, T. 7, § 814; Acts 1951, No. 724, p. 1275.)

2. Rule 8, Federal Rules of Appellate Procedure:

Rule 8. *Stay or Injunction Pending Appeal*

(a) *Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.* Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to the considerated by a single judge of the court.

(b) *Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties.* Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court,

who shall forthwith mail copies to the sureties if their addresses are known.

(c) *Stays in Criminal Cases.* Stays in criminal cases shall be had in accordance with the provisions of Rule 38 (a) of the Federal Rules of Criminal Procedure.

3. Rule 38, Federal Rules of Appellate Procedure:

Rule 38. *Damages for Delay*

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

As the result of a serious traffic accident, the respondents Anthony L. Jackson and Ollie Jackson brought a civil action against the petitioners Magnolia Brokerage Company, Jerrold Dean Thornton, Ligon Specialized Haulers, Inc., and Magnolia Freight Agency, Inc., in the United States District Court for the Northern District of Alabama. Subject matter jurisdiction was premised on diversity of citizenship.

After trial, judgment was entered on a jury verdict in favor of Anthony Jackson against all petitioners in the amount of $350,000.00, and in favor of Ollie Jackson and against all petitioners in the amount of $50,000.00. The case was submitted to the jury on the issues of negligence of the defendants, and wantonness of the defendants. The jury categorized the damage awards as compensatory damages, and the jury declined to award punitive damages. Punitive damages are authorized under Alabama law in the discretion of the jury if the jury finds a defendant guilty of wantonness.

Petitioners moved for new trial and for judgment notwithstanding the verdict, on the ground, among others, that the compensatory damage awards were excessive. The district court denied this motion. The district court found that the damages awarded exceeded the amount that the district court would have found appropriate but refused to order a new trial conditioned on remittitur, reasoning that, although the difference

in the verdict and the amount the court considered fair was "slightly shocking," it was not "totally shocking" to the court's judicial conscience.

Petitioners appealed to the Court of Appeals for the Eleventh Circuit. Their contentions on appeal were (1) that the district court erred in failing to apply the maximum recovery rule standard on the motion for new trial to the assertion that the verdict was excessive, (2) that the plaintiff was guilty of contributory negligence as a matter of law, and (3) that there was not sufficient evidence to support submission of the case to the jury on the theory of wantonness.

The Court of Appeals affirmed the judgments with opinion. This petition does not seek review of this judgment of the Court of Appeals.

The Respondents filed in the Court of Appeals an application styled "Petition for Allowance of Ten Percent Affirmance Fee" in which they prayed for a mandate assessing a penalty against the petitioners based on *Ala. Code* § 12-22-72 (1975). Petitioners opposed this application. The application was granted by the Court of Appeals in its order of November 21, 1984.

REASONS FOR GRANTING THE WRIT

1. The order of the Court of Appeals conflicts with a decision of another court of appeals and conflicts in principle with a decision of this Court.

The Alabama affirmance penalty statute, *Ala. Code* § 12-22-72 (1975), requires that a defendant who unsuccessfully appeals from a money judgment, and who stays the judgment pending appeal, must pay to the plaintiff an additional sum equal to ten percent (10%) of the judgment. The Alabama legislature has seen fit to use this mechanism to deter frivolous appeals in Alabama. *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 87 So. 205 (1920), *Chapman v. Rivers Construction Co.,* 284 Ala. 633, 227 So. 2d 403 (1969). The statute does not require or permit a determination whether the appeal is in fact frivolous.

The Alabama statute conflicts with Rule 38, Fed. R. App. P., in at least the respects that Rule 38 commits imposition of an additional award to the discretion of the court, that Rule 38 requires a determination by the court that the appeal is frivolous, and that Rule 38 applies to any appellant. By comparison, the Alabama statute commits no discretion to the court, applies whether or not the appeal is frivolous, and applies only to appealing defendants.

Applying the Alabama statute without considering Rule 38, Fed. R. App. P., the Court of Appeals awarded the respondents the additional amount of 10% of the judgment.

As a consequence of the *Erie* doctrine,[1] questions can arise when, in the course of a federal court's exercise of diversity jurisdiction, a state rule conflicts with a federal rule. This Court has decided how such questions are to be resolved when the federal rule is embodied in the Federal Rules of Civil Procedure. *Hanna v. Plumer,* 380 U.S. 460 (1965). In such cases, the federal rule is to be applied if the issue in question is addressed by the federal rule, if the federal rule is within the

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[1] *Erie v. Tompkins,* 304 U.S. 64 (1938).

scope of the rules enabling act, and if the federal rule is constitutional. *Hanna v. Plumer,* 380 U.S. at 463, 464.

Applied to the respondents' application for a penalty award in the case at bar, the rule of *Hanna v. Plumer* mandates application of Rule 38, Fed. R. App. P., rather than the Alabama affirmance penalty statute. There is a clear conflict between the federal rule and the state rule on the issue of damages for a frivolous appeal, the issue is directly addressed by the federal Rule 38, the federal Rule 38 is obviously within the scope of the enabling act, and the federal Rule 38 is obviously not unconstitutional. Under Rule 38, the respondents' application for a penalty award was due to be denied because there has been no suggestion that the appeal was frivolous, and there is no support for any finding that the appeal was frivolous. Indeed, the respondents made no effort to invoke Rule 38, but premised their application solely on the Alabama statute.

If it were contended that the Alabama statute is directed not to frivolous appeals, but instead was intended to compensate a plaintiff for a stay of his judgment, the result under *Hanna v. Plumer* would be the same, because Rule 8, Fed. R. App. P., controls the terms and conditions under which a stay of judgment may be granted in a federal court.

No reason ever has been articulated by either the respondents or the Court of Appeals why the Court of Appeals should not have followed *Hanna v. Plumer,* and applied Rule 38. The only possible grounds for distinguishing *Hanna v. Plumer* from the case at bar is that *Hanna* involved a rule in the Federal Rules of Civil Procedure, and this case involves a rule in the Federal Rules of Appellate Procedure. But this would be a meaningless distinction lacking of any merit or justification. No good reason exists why the rules of appellate procedure should not have the same significance under *Hanna v. Plumer* as the rules of civil procedure. Like the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure have been adopted by this Court in the exercise of authority specifically granted by Congress. 28 U.S.C. § 2072, 18 U.S.C. §§ 3771, 3772.

The United States Court of Appeals for the Fifth Circuit has followed *Hanna v. Plumer* and applied Rule 38, Fed. R. App. P., in the almost identical situation involving a similar Mississippi statute. *Affholder v. Southern Rock,* 746 F.2d 305 (5th Cir. 1984). In *Affholder,* the Fifth Circuit overruled its prior case of *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir. 1979), which is the case in which that court had originally applied the Alabama affirmance penalty statute to the exclusion of Rule 38, Fed. R. App. P.

Relying on *Hanna v. Plumer,* the Fifth Circuit held the Mississippi statute to be superseded by Rule 38, stating in its opinion:

> We conclude that Fed. R. App. Proc. 38 precludes such an automatic deterrent to the right to appeal and allows a Federal Appellate Court to chasten an unsuccessful appellant only when it finds an appeal to be frivolous. In doing so, we decline to follow a prior decision by a panel of this circuit holding the Mississippi statute applicable in federal diversity cases because that decision was rendered without consideration of Rule 38.

746 F.2d at 306.

The Court of Appeals in this case declared itself bound by the discredited Fifth Circuit precedent of *Proctor v. Gissendaner.* In so doing, the Court of Appeals did not consider *Hanna v. Plumer,* or Rule 38, Fed. R. App. P., or the rules enabling acts.

Instead, the panel of the Court of Appeals considered the issue foreclosed by *Proctor v. Gissendaner,* noting that in *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit had adopted as binding precedent all decisions of the Fifth Circuit, including *Proctor.* Further, the panel considered itself without authority to depart from *Proctor,* under the local rule of the Eleventh Circuit which precludes a panel of the court from overruling a binding precedent of the circuit. *See, Bonner v. City of Prichard,* 661 F.2d at 1209. Petitioners were denied the opportunity for en banc considera-

tion in the Court of Appeals when their petition for rehearing was denied.

When in *Affholder v. Southern Rock,* the Fifth Circuit considered for the first time its case of *Proctor v. Gissendaner* in light of *Hanna v. Plumer,* the incorrectness of *Proctor* was so obvious that, after the panel concluded Fule 38, Fed. R. App. P., supersedes a state rule, the entire court reconsidered *Proctor sui sponte,* and unanimously overruled it. *Affholder v. Southern Rock,* 746 F.2d at 311.

There exists an irreconcilable conflict in decision between the Fifth Circuit decision of *Affholder v. Southern Rock,* and the Eleventh Circuit's order in this case. Further, the order of the Court of Appeals in this case, and the precedent upon which it is based, conflict in principle with *Hanna v. Plumer.*

This clear conflict warrants issuance of the writ.

2. The Question Presented Is A Question Of Importance.

If the order of the Court of Appeals had no practical impact beyond the present case, and if this case were considered in isolation, then the importance of the question would be difficult to demonstrate. A dispute over a $40,000.00 penalty, while important to these litigants, might not be deemed important by this Court.

But this case should not be considered only in isolation. This question affects every diversity case appeal by a defendant that reaches the Court of Appeals from a federal district court in Alabama. Although petitioners do not know the number of such appeals which reach the Court of Appeals in a typical year, it can safely be assumed that the number of such appeals is not insignificant. Unless there is a legislative change in the Alabama statute or in the statutory diversity jurisdiction, the impact of the Court of Appeal's error will continue year after year.

It could be said that every question urged in a petition for certiorari affects litigants who are similarly situated. The error

of the Court of Appeals in this case is atypical in that it affects every litigant in a comparatively broad category of cases — that is, the category of diversity cases in Alabama federal district courts from which a defendant appeals. It is further true that the error of the Court of the Appeals cuts across the spectrum of civil diversity cases. That is to say, the error affects tort cases in the same way and to the same extent it affects contract cases, or any other kind of civil diversity case.

Moreover, beyond the significance of the question for all Alabama diversity case appeals, the issue has potential impact in every other jurisdiction in which a state standard for punishing frivolous appeals differs from the standard of Rule 38. This case presents the opportunity for clarification that the Federal Rules of Appellate Procedure govern appeals in federal courts, just as the Federal Rules of Civil Procedure prevail in the district courts.

The legal error in the order of the Court of Appeals is plain. This error will affect every litigant in a given category of future cases. Therefore, the question is of sufficient importance to justify issuance of the writ.

3. Issuance of the writ is warranted as an exercise of this Court's supervisory authority over the Court of Appeals.

The proposition was established in *Hanna v. Plumer* that in federal court a federal rule of procedure generally controls over a conflicting state rule. The exceptions are clear-cut and permit application of the state rule only if the federal rule does not address the issue, or if the federal rule is beyond the scope of the enabling act, or if the federal rule is unconstitutional. In the case at bar, there is no colorable argument that application of Rule 38, Fed. R. App. P., fits any of these exceptions.

Application of the principles of *Hanna v. Plumer* in this case is so straightforward that it is almost mechanical. Such application would have resulted in denial of respondents' application for imposition of a penalty. Yet the Court of Appeals

did not follow *Hanna v. Plumer,* and indeed did not even acknowledge the existence of this controlling precedent.

The Court of Appeals has written to this same issue in one other reported case, *Locke v. Allstate Insurance Co.,* 696 F.2d 1340 (11th Cir. 1983). In addition, the Court of Appeals for the Fifth Circuit wrote to this question on two occasions before the Eleventh Circuit was separated from the Fifth Circuit in 1981, in *Proctor v. Gissendaner,* and in *King v. Ford Motor Co.,* 604 F.2d 317 (5th Cir. 1979). In none of these four instances did the court cite or apply *Hanna v. Plumer,* evidencing a dearth of analysis not appropriate in the federal courts. A federal court of appeals does not have the prerogative to overlook or ignore controlling precedent of this Court.

Litigants in the federal system are entitled to a higher level of jurisprudence than that reflected in the Eleventh Circuit's treatment to date of the affirmance penalty issue. Litigants are entitled to expect that controlling decisions of this Court at least be considered in the courts of appeals. *Jaffree v. Wallace,* 705 F.2d 1526, 1532 (11th Cir. 1983) ("Federal district courts and circuit courts are bound to adhere to controlling decisions of the Supreme Court.")

As matters now stand, the situation exists that the Eleventh Circuit continues to follow *Proctor v. Gissendaner,* a Fifth Circuit precedent that the Fifth Circuit has unanimously overruled in *Affholder v. Southern Rock,* and that directly conflicts in principle with this Court's decision in *Hanna v. Plumer.* In addition, it appears that a panel of the Eleventh Circuit is precluded by that court's local rule from even considering *Hanna v. Plumer,* because the panel below reasoned that only the court sitting en banc has the authority to reexamine *Proctor.*

The panel below committed fundamental and undefendable error when, on the basis of a local circuit rule, it gave greater deference to an overruled Fifth Circuit case than to a controlling precedent of this Court. The local circuit rule cannot justify disregard of a controlling decision of this Court.

These Petitioners respectively submit that the Court of Appeals' adherence to a Fifth Circuit precedent which the Fifth Circuit has overruled, coupled with the Court of Appeals' disregard of the controlling decision of this Court in *Hanna v. Plumer,* warrants issuance of the writ because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Eleventh Circuit entered November 21, 1984, such order should be vacated, and the Respondents' application for imposition of a penalty against these Petitioners should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A-1

Jackson v. Magnolia Brokers, et. al., 742 F.2d 1305 (11th Cir. 1984):

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

RONEY, Circuit Judge:

For injuries incurred when his automobile collided with a trailer truck, Anthony L. Jackson received a jury verdict for $350,000, his wife $50,000 for loss of services and consortium. The defendants argue on appeal that the district court applied the wrong standards in denying their motions for a new trial on the grounds that the verdict was against the weight of the evidence and excessive, and that their motions for a directed verdict and judgment notwithstanding the verdict should have been granted as to liability. Holding the district court properly applied the correct standards, we affirm.

In deciding whether the verdict was excessive, the district court reluctantly applied the "shocks the conscience of the court" standard, determining as follows:

> Philosophically this court feels that, as in criminal sentencings, there should be some standards of damages in personal injury cases which should not totally subject either plaintiffs or defendants to the inexpert assessments of jurors. Apparently, the only standard is whether the verdict shocks the conscience of the court. It is not clear whose conscience provides the measure; that of the trial judge or the appellate court.
>
> If this court were awarding damages, after a finding of liability, it would consider $250,000.00 to Anthony L. Jackson and $30,000.00 to Ollie Jackson as fair. There is a difference of $120,000.00. However, the court cannot say that the difference is indicative of bias, passion, prejudice, or corruptness or, in this day and time, that it is totally shocking. It was slightly shocking but not to the extent to evidence bias, passion, prejudice, or corruption. The court thus does not conclude that the verdict is excessive. However, the court's decision is based on the perception which the court has of the deference of appellate courts, by whose

decision this court is bound, to jury damage awards. The court's ruling should not be viewed on appeal as adding strength to verdict. If the matter were discretionary with the court, it would determine that $280,000.00 is a fair award and reduce the total judgments to $280,000.00. If the court's approach to making its decision is incorrect, it is in error.

The defendant argues that the court should have used the so-called "maximum recovery rule" rather than the "shocks the conscience" rule. It is quite apparent, however, that the maximum recovery rule is normally applied to determine the amount of remittitur that may be ordered in lieu of a new trial once the court has decided that the verdict is excessive. *Warren v. Ford Motor Credit Co.*, 693 F.2d 1373 (11th Cir. 1982); *see Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970), *modified*, 456 F.2d 180 (5th Cir. 1972), *cert. denied*, 407 U.S. 921, 92 S.Ct. 2463, 32 L.Ed.2d 807 (1972); *Keyes v. Lauga*, 635 F.2d 330 (5th Cir. 1981); *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665 (5th Cir. 1974). To the extent that the maximum recovery rule could be applied to determine excessiveness, it would do nothing more than set the figure that the jury could reach without shocking the conscience of the court under the traditional standard. *Allen v. Seacoast Products, Inc.*, 623 F.2d 355, 364 (5th Cir. 1980).

In any event, it is clear that the very function of the maximum recovery rule is to avoid a determination by a court as to what it might consider to be a "fair" award, such as the district court's indication here that $280,000 might be more appropriate than $400,000. Applying on review the correct standard of whether the jury verdict "shocks the conscience of the court," we conclude that notwithstanding the district court's doubts as to the size of the award the amount of the verdict in this case cannot be disturbed on appeal.

We also conclude that the district court's rulings on liability should stand on appeal. The accident occurred between 10:00 and 11:00 p.m. when plaintiff's car, while traveling at a speed of approximately 50-55 miles per hour, hit the rear end of a

trailer truck when the truck pulled onto the highway from the paved shoulder or emergency lane of the interstate. The road conditions were excellent and visibility good for night-time driving. The driver of the trailer truck saw the plaintiff approaching and saw the two left lanes occupied by two trailer trucks. The trailer truck pulled out onto the highway and the plaintiff collided with the truck. As a result of the collision, Jackson lost his right eye and has been fitted with a prosthetic right eye. He sustained a broken nose, multiple fractures to bones in the mid-face and injury to his left shoulder. He had medical expenses of $12,196.61. Jackson was also unable to work from May 16, 1982 until August 28, 1982, although he lost no wages and is doing the same work as a residential loan underwriter.

To grant a motion for new trial the district judge must find the verdict contrary to the great weight of the evidence. The judge can reweigh the evidence. The trial court will be reversed only for abuse of discretion. *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir. 1982). On motion for judgment notwithstanding the verdict, the court considers the evidence in the light most favorable to the nonmoving party and will grant the motion where the evidence so strongly and favorably points in favor of one party that reasonable men could not arrive at a contrary verdict. The judge cannot reweigh the evidence. *Warren v. Ford Motor Credit Corp.*, 693 F.2d 1373, 1374 (11th Cir. 1982) (citing *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc)).

A review of the record demonstrates that the district court applied these proper standards in connection with the defendants' motions and is not subject to reversal on appeal.

Defendants claim that plaintiff was contributorily negligent and based this on the following evidence: the highway was straight and level, the weather clear and dry, visibility perfect, eye witnesses say the truck was visible for at least one mile, witnesses say the truck entered the highway when plaintiff's car was at least a mile away, truck lights and signal were on as the truck entered the highway, and other vehicles on the

highway pulled to the left lane. No obstructions blocked the view of the truck. Plaintiff did not change lanes or slow down. Plaintiff stated that he first saw the truck when he was within 200 feet of the truck. Plaintiff did not apply brakes until point of impact and was traveling at 50-55 miles per hour at impact. He admitted he misjudged the speed of the truck.

Contrary evidence showed that: defendant was parked in an emergency lane to make a routine check of his load, the Code of Alabama clearly instructs a driver to not proceed onto the highway from the emergency lane until such movement can be made with reasonable safety, the truck driver saw the plaintiff approaching, he saw two semi-trailers in the process of passing the plaintiff, and he pulled out into the same lane in which plaintiff was traveling. This evidence when viewed in the light most favorable to the plaintiff is substantial to support the issue of contributory negligence as a jury question. The evidence was sufficient to submit the question to the jury. The evidence was such that a jury could find the plaintiff was free from negligence which proximately contributed to his injury. *Kilcrease v. Harris,* 288 Ala. 245, 259 So.2d 797, 801 (1972).

Defendants argue that the issue of wantonness should not have gone to the jury because the evidence shows that defendant looked into his side mirrors for oncoming traffic prior to entering the highway but he did not look over his shoulder. Defendant saw headlights that he estimated to be a quarter of a mile away. He could not judge the distance of the oncoming traffic with complete accuracy but he assumed he had time to enter the interstate safely, and he assumed the more rapidly moving vehicles would move to the left lane.

Plaintiff maintains that defendant knew there was danger in moving back onto the highway, that he would be moving at a slow speed, that an automobile was approaching in that lane, that two trucks were approaching in the left lane and that plaintiff would have to change lanes.

The Alabama Supreme Court has defined wantonness as "the conscious doing of some act or the omission of some duty under the knowledge of the existing conditions, and conscious

that from doing of such act or omission of such duty injury will likely or probably result." *Kilcrease v. Harris,* 288 Ala. 245, 259 So.2d 797, 801 (1972). The evidence when viewed in the light most favorable to the plaintiff was substantial to support the wantonness instruction.

AFFIRMED.

APPENDIX A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7365

ANTHONY L. JACKSON, et al,
Plaintiffs, Appellees,

versus

MAGNOLIA BROKERAGE COMPANY, et al,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING
(November 21, 1984)

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY

United States Circuit Judge

APPENDIX A-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7365

ANTHONY L. JACKSON, et al.,
Plaintiffs-Appellees,

versus

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Alabama

(November 21, 1984)

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

O R D E R :

IT IS ORDERED that the application for 10% allowance to judgment pursuant to Title 12, Code of Alabama, Section 12-22-72 (1975) be, and the same hereby is, GRANTED.

The Fifth Circuit decided in *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir. 1979), that the Alabama statute which provides for the addition of 10% of a judgment which is stayed and unsuccessfully appealed is binding in a federal appellate court under *Erie v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188 (1938). This Court has adopted the decisions of the Court of Appeals for the Fifth Circuit rendered prior to October 1, 1981 as binding precedent of this Court, subject to overrule only by the court sitting *en banc. Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981). Accordingly, this Court is bound by *Proctor. See Locke v. Allstate Ins. Co.,* 696 F.2d 1340 (11th Cir. 1983); *King v. Ford Motor Co.,* 604 F.2d 317 (5th Cir.

1979). *See also Walters v. Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984); *but see Affholder v. Southern Rock*, ____ F.2d ____ (5th Cir. 1984) [No. 83-4420].

APPENDIX A-4

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7365

ANTHONY L. JACKSON and OLLIE JACKSON,
Plaintiffs-Appellees,

versus

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

(Opinion September 227, 2984, 742 F.2d 1305 (5th Cir. 1984)

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY

United States Circuit Judge

APPENDIX A-5

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7365

D.C. Docket No. CV82-PT-1628-S

ANTHONY L. JACKSON and OLLIE JACKSON,
Plaintiffs-Appellees,

versus

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants,

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 27, 1984
For the Court: Spencer D. Mercer, Clerk

By: /s/ MIGUEL J. CORTEZ, JR.
Deputy Clerk

ISSUED AS MANDATE: Jan. 29, 1985

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANTHONY L. JACKSON and OLLIE JACKSON,
Plaintiffs,

v.

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants.

CIVIL ACTION NO.: CV82-PT-1628-S

MEMORANDUM OPINION

This cause comes on to be heard on defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial filed on April 21, 1983. The court notes that grounds 5-19, 22 and 23 relate to rulings of the court which were duly considered at the trial. The motion will be overruled as to said grounds with brief comments as to a few of the grounds in the order stated. The court will not address each ground individually.

Grounds 5, 6, 7, 8, 15, 16 and 17. The court is satisfied that all the issues were for the jury. The court notes that the jury specifically did not award punitive damages.

Grounds 9, 10 and 11. These charges were given in substance.

Grounds 12, 13 and 14. The court is of the opinion that these charges place undue emphasis on the defense of contributory negligence and should not be given.

Grounds 18 and 19. The court gave defendants every opportunity to suggest error in the charge and to suggest a manner of addressing the jury's question. No exception was taken and no suggestion was given.

Grounds 22 and 23. The court is of the opinion that an emergency was not clearly created through fault of the plaintiffs and that the charge was appropriate.

Grounds 20 and 21. These grounds are precluded by F. R. Civ. P. 54 (c). See the rule, cases interpreting it and the comments thereunder.

Grounds 1-4. These grounds all pertain to the claimed excessiveness of the verdict and present the more difficult question for resolution. The only case cited by defendants in which an appellate court reduced an award for the loss of an eye is *Walker v. Von Elton Champion,* 274 So.2d 840 (La. App. 1973). The appellate court reduced a $100,000.00 bench award to $35,000.00. Defendants have suggested the verdict was excessive "particularly after considering the negligence of the plaintiff, Mr. Jackson. . . ." Of course, the court cannot take make any such comparative negligence assessment. Plaintiff has also cited *Allen v. Seacoast Products, Inc.,* 623 F.2d 355 (5th Cir. 1980). In *Allen* there was proof of $30,000.00 in loss of earnings. In *Allen* there was a dispute as to impairment of earning capacity. In this case there was no such proof. In *Allen* the medical expenses were $5,000.00. Here they were $13,000.00. In this case there was evidence of considerable pain, suffering and mental anguish and an initially grotesque injury.

Judge Brown stated in *Allen* that, "We have repeatedly held that the jury's award is not to be disturbed unless so large as to 'shock the judicial conscience' or indicate 'bias, passion, prejudice, corruption, or *other improper motive*' on the part of the jury." 623 F.2d at 364 (emphasis added). Further that, "Comparison of verdicts rendered in different cases is not a satisfactory method for determining excessiveness *vel non* in a particular case and . . . each case must be determined on its own facts." 623 F.2d at 364 (quoting *Fruit Indus., Inc. v. Petty,* 268 F.2d 391, 395 (5th Cir. 1959)). Judge Brown further stated that the award in *Allen* "is very generous but not shocking to our conscience." 623 F.2d at 366.

Plaintiff has also cited *Stineman v. Fontbonne College,* 664 F.2d 1082 (8th Cir. 1981). In that case an award of $800,000.00 for loss of vision in one eye was reduced to $600,000.00. The plaintiff in that case was also deaf. A dissenter cited a case in

which $1,000,067.00 had been awarded for the loss of an eye and argued that the $800,000.00 was not excessive.

Philosophically this court feels that, as in criminal sentencings, there should be some standards of damages in personal injury cases which should not totally subject either plaintiffs or defendants to the inexpert assessments of jurors. Apparently, the only standard is whether the verdict shocks the conscience of the court. It is not clear whose conscience provides the measure; that of the trial judge or the appellate court.

If this court were awarding damages, after a finding of liability, it would consider $250,000.00 to Anthony L. Jackson and $30,000.00 to Ollie Jackson as fair. There is a difference of $120,000.00. However, the court cannot say that the difference is indicative of bias, passion, prejudice, or corruptness or, in this day and time, that it is totally shocking. It was slightly shocking but not to the extent to evidence bias, passion, prejudice, or corruption. The court thus does not conclude that the verdict is excessive. However, the court's decision is based on the perception which the court has of the deference of appellate courts, by whose decisions this court is bound, to jury damage awards. The court's ruling should not be viewed on appeal as adding strength to the verdict. If the matter were discretionary with the court, it would determine that $280,000.00 is a fair award and reduce the total judgments to $280,000.00. If the court's approach to making its decision is incorrect, it is in error.

An order in accordance with this Memorandum Opinion will be entered contemporaneously herewith.

This the 18 day of May, 1983.

/s/ ROBERT B. PROPST

Robert B. Propst
United States District Judge